

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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OFRA N. LOPEZ,

Plaintiff,

v.

U.S. BANK NATIONAL ASSOCIATION,

Defendant.

Case No. 2:13-cv-01232-MMD-PAL

ORDER

(Def.'s Motion to Dismiss – dkt. no. 6)

I. SUMMARY

Before the Court is Defendant U.S. Bank National Association's Motion to Dismiss. (Dkt. no. 6.) For the reasons discussed below, the Motion is granted.

II. BACKGROUND

The facts of this case are not readily ascertainable from *pro se* Plaintiff's form¹ Complaint. However, Plaintiff's claims presumably arise out of the foreclosure on Plaintiff's real property located at 5250 Burnham Ave., Las Vegas, Nevada (the "Property").

¹The same Complaint, or some form of it, has appeared in several cases in the District. See, e.g., *Feldman-Snyder v. Leman Brothers Holdings Inc.*, No. 2:13-cv-00445-MMD-VCF; *Beebe v. Fed. Nat'l Mort. Assoc.*, No. 2:13-cv-311-JCM-GWF; *Burd v. Countrywide Sec.*, No. 2:13-cv-338-MMD-VCF; *Burd v. J.P. Morgan Chase*, No. 2:13-cv-337-JCM-PAL; *Duenas v. Bank of Am.*, No. 2:13-cv-354-GMN-GWF; *Salinas v. Fed. Nat'l Mort. Assoc.*, No. 2:13-cv-407-JCM-GWF; *Gonzalez v. Bank of New York Mellon*, No. 2:13-cv-306-GMN-CWH; *Santivanes v. Bank of New York Mellon*, No. 2:13-cv-00299-JCM-GWF; *Gamboa v. Goldman, Sachs & Co., et al.*, No. 2:13-cv-00282-GMN-CWH; *Prince v. Loop Capital Markets, LLC*, 2:13-cv-00429-MMD-GWF.

1 The only background fact ascertainable from the record before the Court is that
 2 Plaintiff obtained a \$145,652.00 loan from RMS & Associates on or about August 18,
 3 2005, which was secured with a deed of trust encumbering the property. (Dkt. no. 5, Ex.
 4 1.)² Plaintiff brought suit against Defendant on April 4, 2013. It is unclear from the
 5 Complaint, the Motion, Response, or Reply what relationship Defendant has with the
 6 Property. Additionally, Plaintiff's Complaint does not list any causes of action, but simply
 7 avers that "[j]urisdiction arises under Nevada and Federal statutes for intentional
 8 misrepresentation and negligent misrepresentation." The Complaint's main focus is that
 9 the ownership interest in Plaintiff's mortgage was forfeited due to errors in the
 10 securitization process of Plaintiff's mortgage. Plaintiff seeks reconveyance of the
 11 Property free and clear of encumbrance and \$124,500.00.

12 III. DISCUSSION

13 A. Legal Standard

14 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
 15 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide
 16 "a short and plain statement of the claim showing that the pleader is entitled to relief."
 17 Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This
 18 statement must give the defendant fair notice of a legally cognizable claim and the
 19 grounds on which it rests. *Id.* A district court must accept as true all well-pled factual
 20 allegations in the complaint; however, legal conclusions are not entitled to the
 21 assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Mere recitals of the
 22 elements of a cause of action, supported only by conclusory statements, do not suffice.
 23 *Id.* at 678. *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica*
 24 *Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988).

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27 ²"[O]n a motion to dismiss a court may properly look beyond the complaint to
 28 matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for
 summary judgment." *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

1 While Rule 8 does not require detailed factual allegations, it demands “more than
2 labels and conclusions” and “[f]actual allegations must be enough to rise above the
3 speculative level.” *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a
4 complaint must contain sufficient factual matter to “state a claim to relief that is plausible
5 on its face.” *Id.* at 570. When the claims in a complaint have not crossed the line from
6 conceivable to plausible, the plaintiff’s complaint must be dismissed. *Id.*

7 **B. Analysis**

8 The Court finds that Plaintiff’s Complaint fails to state a claim upon which relief
9 may be granted. The Complaint suffers from three significant deficiencies. First, the
10 contents of the Complaint are severely lacking in form and substance. Not only does the
11 Complaint not identify particular causes of action, but the factual allegations are vague
12 and devoid of any detail regarding specific actions by Defendant. In fact, the Complaint
13 does not specify who issued the Notice of Default or even if Plaintiff was actually
14 deprived of property in foreclosure proceedings. In short, the Complaint does not provide
15 notice to Defendants of a legally cognizable claim and the grounds on which it rests.

16 Second, although the Complaint references intentional and negligent
17 misrepresentation, the Complaint relies on theories related to the securitization of the
18 mortgage. These theories have been expressly rejected by this Court and the Ninth
19 Circuit. *See, e.g., Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th
20 Cir. 2011) (split the note); *Ernestberg v. Mortgage Investors Group*, No. 2:08-cv-01304-
21 RCJ-RJJ, 2009 WL 160241, *4–*5 (D. Nev. Jan. 22, 2009) (show me the note), *Dyson*
22 *Fourness v. Mortgage Elec. Registration Sys., Inc.*, No. 3-10-cv-40-ECR-RAM, 2010 WL
23 5071049 (D. Nev., Dec. 6, 2010) (extinguish the note); *Chavez v. Cal. Reconveyance*
24 *Co.*, No. 2:10-cv-00325-RLH-LRL, 2010 WL 2545006 (D. Nev. June 18, 2010)
25 (securitization voids the deed of trust). Moreover, to the extent that Plaintiff is asserting
26 the *process* of securitization was somehow deficient, as a non-party to the pooling and
27 service agreement, Plaintiff lacks standing to challenge that process. *See Armeni v.*
28 *America’s Wholesale Lender*, No. CV 11-8537 CAS (AGRx), 2012 WL 603242, at *3

1 (C.D. Cal. Feb. 24, 2012). Thus, to the extent the Complaint purports to state claims
2 under these theories, the claims fail as a matter of law and are dismissed with prejudice.

3 Finally, to the extent that the Complaint relies on theories of misrepresentation,
4 the Complaint does not allege sufficient allegations to support the elements of these
5 claims. To state a claim for intentional misrepresentation a plaintiff must show: (1) a
6 defendant made a false representation; (2) with knowledge or a belief that the
7 representation was false (or knowledge that defendant had an insufficient basis for
8 making the representation); (3) with the intention of inducing the party to act or refrain
9 from acting upon the misrepresentation; (4) the plaintiff justifiably relied on the
10 representation; and (5) the plaintiff suffered damage. *Scaffidi v. United Nissan*, 425 F.
11 Supp. 2d 1159, 1168-69 (D. Nev. 2005). Negligent representation requires the same
12 showing except that a plaintiff need only show that the defendant made the
13 representation without a reasonable basis for believing its truthfulness, *id.* at 1170, or
14 that defendant made no representation despite a duty to speak, *In re Agribiotech, Inc.*,
15 291 F.Supp.2d 1186, 1191–92 (D. Nev. 2003). Intentional misrepresentation is subject
16 to a three-year statute of limitations, NRS 11.190(3)(d); negligent misrepresentation is
17 subject to a two-year statute of limitations, NRS11.190(4)(e).

18 Plaintiff's Complaint does not allege that any Defendant made any representation
19 to Plaintiff. Nor does it include allegations encompassing any of the other elements of
20 intentional or negligent misrepresentation. As such, the Complaint is insufficient to state
21 a claim upon which relief may be granted and must be dismissed.³ Moreover, any
22 representation made in connection with the September 29, 2005 securitization (see
23 Compl., dkt. no. 1, Ex. 1), is inactionable under the respective statutes of limitations, and
24 Plaintiff has alleged no facts that would have prevented discovery of the alleged
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27 ³The Court also notes that the Complaint fails to specify "the who, what, when,
28 where and how" of the misstatement as required under the heightened pleading
standard of Fed. R. Civ. P. 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106
(9th Cir. 2003).

1 misrepresentation until recently. Nonetheless, if Plaintiff is able to allege sufficient facts
2 about a misrepresentation by Defendant satisfying the requirements of Rules 8(a) and
3 9(b), and facts sufficient to toll the applicable statute of limitations, Plaintiff may bring an
4 amended complaint to cure the articulated deficiencies. However, Plaintiff must bring any
5 motion to amend, together with a proposed amended complaint that cures the articulated
6 deficiencies pursuant to Local Rule 15-1 within 30 days or the Complaint will be
7 dismissed with prejudice.

8 **III. CONCLUSION**

9 It is therefore ordered that Defendant U.S. Bank National Association's Motion to
10 Dismiss is granted. The Complaint is dismissed without prejudice. To the extent Plaintiff
11 is able to allege sufficient facts to cure the deficiencies identified in this Order, Plaintiff
12 has 30 days to file an amended complaint. Failure to file an amended complaint within
13 thirty (30) days shall result in dismissal of this action with prejudice.

14 DATED THIS 27th day of January 2014.

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18 MIRANDA M. DU
19 UNITED STATES DISTRICT JUDGE
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